Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

CASE NO. 84-429

IN THE SUPREME COURT OF THE UNITED STATES

_____TERM

INTERNATIONAL INDEMNITY COMPANY,

Applicant for Certiorari

versus

JIMMY ENFINGER, BY AND THROUGH
HIS NEXT FRIEND, JOHNNIE ENFINGER,

Respondent

INTERNATIONAL INDEMNITY COMPANY,

Applicant for Certiorari

versus

TOMMY LEE ODOM,

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENTS

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RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

Now come JIMMY ENFINGER and TOMMY LEE ODOM, Respondents in the above matter, and pursuant to this Court's Rule 34 submit

the following in response to International Indemnity Company's ("International") petition for writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

Because the questions for review as presented by International were not raised in the courts below, Respondents do not take exception with their statement by Petitioner but simply deny that any such issues are subject to review in this action.

LIST OF PARTIES

Respondents are satisfied with the list of parties as contained in International's petition.

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International Indemnity Company vs. Jimmy Enfinger, by and through his next friend, Johnnie Enfinger, 253 Ga. 185 (____ SE2d _____), reversing 170 Ga. App. 443 (___ SE2d _____).

International Indemnity Company vs. Tommy Lee Odom, 253 Ga. 210 (____ SE2d _____), reversing 170 Ga. App. 447 (_____ SE2d _____).

JURISDICTIONAL GROUND

In accordance with Rule 34.2, Respondents have no response to International's statement of the grounds upon which it seeks to invoke this Court's jurisdiction, except to state that for the reasons as hereinafter set forth in the argument and citation of authority, this Court is without jurisdiction to grant a writ of certiorari in this matter.

CONSTITUTIONAL PROVISIONS INVOLVED

In accordance with this Court's Rule 34.2, Respondents are unable to formulate any response to International's statement of the constitutional provisions involved in that by its petition for writ of certiorari International failed to set forth the constitutional provisions which the case alledgedly involves by either setting them out verbatim, giving appropriate citation therefor, or including the same in its appendix, all as required by this Court's Rule 21.1(f).

STATEMENT OF CASE

At its 1974 session, the Georgia Legislature enacted the Georgia Motor Vehicle Accident Reparations Act, commly known as Georgia's "no-fault" law [Ga. Laws 1974, pp. 113, et seq. (O.C.G.A. §33-34-1, et seq.; former Ga. Code Ann. §56-3401b, et seq.)], to become effective March 1, 1975. Under this Act each insurer was required to make available to each insured no-fault protection to the extent of at least $50,000. The Act provided that these limits could be rejected or reduced by the insured to not less than $5,000 only "by written consent of the policyholder" (O.C.G.A. §33-34-5(a)(1)).

The Act then went further to provide that the application blank for the policy "must contain separate spaces for the insured to indicate his acceptance or rejection of each of the optional coverages listed in subsection (a)" O.C.G.A. §33-34-5(b).

The original Act failed, however, to take into account policies which would be in existence on its effective date, March 1, 1975. No application would be submitted for these policies because they would already be in existence. In order to cure this defect, the 1975 session of the Legislature amended the original Act (prior to its effective date) to add subsection (c) [O.C.G.A. §33-34-5(c)] which provided:

> "On and after the effective date of this Act, all named insureds in existing motor vehicle liability policies who have not previously responded to an offer to accept or reject the optional coverages required to be offered by this Act shall be given an opportunity to accept or reject, in writing, the optional coverages required to be offered under this section. Provided, however, that the failure of an insured to notify his insurer of his written acceptance or rejection within thirty days after written notice of the offer has been mailed by the insurer postage prepaid, by first class mail to the address stated in the policy, shall constitute a rejection of the optional coverage."

This amendment came into effect simultan-

eously (March 1, 1975) with the original Act.

As noted in International's application to this Court, although unsupported by evidence in the record, International was formed two years after the no-fault law had been enacted. In the subsequent course of its business, it issued to both Odom and Enfinger liability insurance policies containing no-fault coverage. The Odom policy was issued on August 5, 1977 based upon Odom's application of August 5, 1977 [See Addendum A hereto]. Enfinger's policy was issued on August 26, 1980 based upon an application of the same day. [See Addendum B hereto]

Neither of the applications upon which these policies were issued complied with the statutory mandate contained in O.C.G.A. §33-34-5(b) in that neither contained "separate spaces for the insured to indicate his acceptance or rejection of each of the optional coverages." Additionally,

the box on the Enfinger application for the rejection of the additional no-fault benefits was not marked by Enfinger in any manner.

Thereafter, on January 18, 1978 as to Odom, and on September 22, 1980 as to Enfinger, [Addendum C and D hereto] International allegedly forwarded to each insured a letter which it now contends was a "written offer of optional personal injury protection coverages as well as property damage coverages. . .to solicit the sale of additional amounts of coverage pursuant to O.C.G.A. §33-34-5(c)" [Petition, p. 8].

On October 22, 1980, some two years and nine months after the alleged letter to Odom and one month after the alleged letter to Enfinger, the Georgia Court of Appeals issued its decision in the case of Jones v. State Farm Mut. Auto Ins. Co., 156 Ga. App. 230 (274 SE2d 623) holding that the effect of the non-compliance of an insurer's

application with the statutory mandate of O.C.G.A. §33-34-5(b) by failing to provide separate spaces for the insured to indicate his acceptance or rejection of each of the optional coverages listed in subsection (a) of this Code section, was to leave open a "continuing offer" of the $50,000 mandatory coverage which the insured could accept even post-accident. Under this "continuing offer theory" according to the Jones Court, the insurer's defective application blank could be corrected by mailing to the insured an offer under O.C.G.A. §33-34-5(c), failure to respond to which would terminate the continuing offer, thus subsection (c) was construed as a "corrective mechanism".

This Jones rationale was subsequently followed by the United States District Court for the Northern District of Georgia in the cases of State Farm Mut. Auto. Ins. Co. v. Bates, [542 FSupp 807, June 30, 1982] and Shave v. Allstate Ins. Co.

[549 FSupp 1006, September 23, 1982].

After the issuance of their policies both Odom and Enfinger suffered serious injuries in automobile accidents thus bringing into play their respective no-fault coverages. Demand was made by each on International for $50,000 in no-fault benefits. In each case, International refused payment contending that its liability was limited to $5,000.

On March 16, 1982 (after Jones but before Bates and Shave) International instituted in the State courts a declaratory action against Odom seeking a declaration as to its non-liability for benefits in excess of $5,000, but making no mention either of any defense to liability under O.C.G.A. §33-34-5(c) nor of the constitutional issues which it now seeks to raise. Odom answered and filed his counterclaim for the $45,000 of additional benefits, statutory penalties and attorney's fees.

In August 1982 (after Jones, Bates and Shave), Enfinger filed his action against International seeking recovery of the additional $45,000 benefit together with certain statutory bad faith penalties and punitive damages. Within the thirty days provided by law, International filed its answer to Enfinger's complaint setting forth twelve separate defenses and one counterclaim for equitable reformation. None of these defenses made any contention that O.C.G.A. §33-34-5(c) had any application, nor raised any of the constitutional issues here raised.

On January 19, 1983, International filed its motion for summary judgment against Odom setting forth the some nine grounds of defense again making no mention whatsoever of any application of subsection (c) to that matter, and again silent as to the constitutional issue here.

On March 3, 1983, the Supreme Court

of the State of Georgia issued its ruling in Flewellen v. Atlanta Cas. Co., 250 Ga. 709 (300 SE2d 673) wherein it specifically rejected the "continuing offer theory" of Jones, supra, and held that the legal effect of the failure of an insurer to comply with the statutory mandate of O.C.G.A. §33-34-5(b) was that there was no written rejection of the optional coverage as required by subsection (a), thus resulting in an acceptance as a matter of law of the $50,000 PIP coverage:

> "The contract must be construed in light of the statute. The statute says that $50,000 PIP coverage is the least the insurer must offer. O.C.G.A. §33-34-5(a). The statute also says this offer of coverage may be refused only by a signed rejection in writing. O.C.G.A. §33-34-5(a) and (b) In the absence of such a rejection, the policy, therefore, provides $50,000 PIP coverage from its inception." p. 712 (Emphasis supplied)

Further, Flewellen addressed each and every issue which had been raised to that

point by International in both the Odom and the Enfinger litigation, in each instance contrary to International's position.

On March 15, 1983, Odom filed his response to International's motion for summary judgment. On that same day, International supplemented its motion for summary judgment raising for the first time in that case any contention that subsection (c) had any application to this matter and that Odom's coverage was limited to $5,000 because of his failure to respond to International's alleged letter of January 18, 1978, but again remaining silent as to the constitutional violations now complained of.

The next day, on March 16, 1983, the Supreme Court issued its ruling in GEICO v. Mooney, 250 Ga. 760 (300 SE2d 799), reiterating its Flewellen decision stating "[t]he absence of a written rejection will

be interpreted as an acceptance of the additional coverage. Flewellen, supra. This absence of written rejection or reduction of additional benefits as required by the statute is dispositive of the issue of coverage regardless of the presence or absence of signatures or the propriety of the form itself." p. 761

At pretrial conference on April 4, 1983, International amended its answer in Enfinger by adding an additional defense based upon its new subsection (c) contentions, but made no mention of any constitutional issues.

The trial court in both cases rejected International's subsection (c) defense, held that it did not constitute a rejection of the coverage, and each of the insureds was entitled to the full $50,000 coverage.

Both matters were then appealed by International to the Georgia Court of

Appeals. No constitutional issues were raised by it in either of these appeals.

On February 28, 1984, in a five-to-four decision, the Georgia Court of Appeals reversed the trial court in Enfinger, simply stating that it agreed with International that subsection (c) was applicable. The dissenting Justices vigorously disagreed with the majority on the basis of the Georgia Supreme Court's earlier decisions in Flewellen, supra, GEICO, supra, Wiard v. Phoenix Ins. Co., 251 Ga. 698, (____ SE2d _____), Stafford v. Allstate Ins. Co., 252 Ga. 38 (____ SE2d ____), and both the special concurring decision and dissenting decisions from an order of vacation of a writ of certiorari by the Supreme Court in Nalley v. Select Ins. Co., 165 Ga. App. 345, (___ SE2d _____) stating pointedly that subsection (c) had no application to post March 1, 1975 policies--all of which decisions had been ignored

by the majority.

On March 8, 1984, the Court of Appeals issued its decision in Odom reversing the trial court on the basis of its earlier decision in Enfinger.

The Georgia Supreme Court granted certiorari to review the Court of Appeals decision in both Enfinger and Odom, and after hearing argument on the two cases together on June 27, 1984, reversed the Court of Appeals decision in Enfinger on June 29, and in Odom on July 6. The basis of the Supreme Court's decision was its earlier holdings in Flewellen, supra, GEICO, supra, Wiard, supra, and Stafford, supra.

At no time either in the Georgia Court of Appeals or prior to judgment in the Georgia Supreme Court did International raise any of the constitutional issues set forth by it in its petition for writ of certiorari here.

After the Georgia Supreme Court's

decision in Enfinger and Odom, International filed its motion for rehearing, and for the first time sought to raise the equal protection issue specified by it as issue (A)1 here. See Addendum E attached. At no point has it ever raised at any level prior to its application for writ of certiorari to this Court the issues here specified by it as (A)2, (A)3, (A) 4, and (A)5. No ruling was made by the Georgia Supreme Court on the constitutional challenges enumerated in its motion for rehearing. See Addendum F and G hereto attached.

SUMMARY OF ARGUMENT

Respondents' argument in this matter is two-fold. First, Respondents argue that this Court lacks jurisdiction to issue a writ of certiorari here because of International's failure to raise in either the trial court or the appellate courts below the constitutional issues which it now seeks to have heard, all contrary to the mandate of 28 U.S.C. §1257(3), and to this Court's ruling in Webb v. Webb, 451 US 493, 68 LEd 2d 392, 101 SCt 1889 (1981). In the same vein, International's petition in this matter fails to comply with this Court's Rule 21.1(h).

Additionally, the facts in this matter as outlined in Respondents' statement of facts clearly show that International's failure to raise its constitutional issues at the appropriate time is not excused under either Cox Broadcasting Corp. v. Cohn, 420 US 469, 43 LEd 2d 328,

95 SCt 1029 (1975), nor under Missouri v. Gehner, 281 US 313, 74 LEd 870, 50 SCt 326 (1930) and Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 US 673, 74 LEd 1107, 50 SCt 451 (1930), as contended by it.

The second part of Respondents' argument shows that this Court should not issue its writ of certiorari here because International's petition fails to show the existence of any important question of federal law which needs to be settled, or any decision of this Court with which the judgment complained of conflicts, all as required by this Court's Rule 21.1(j) and this Court's Rule 17.

ARGUMENT AND CITATON OF AUTHORITY

A. THIS COURT LACKS JURISDICTION TO ISSUE A WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT IN THIS MATTER.

Petitioner failed to timely raise its constitutional claims in the Courts below.

International seeks to invoke this Court's jurisdiction to grant a writ of certiorari under 28 U.S.C. §1257(3) [Petition, p. 6]. No such jurisdiction, however, is conferred under that statute because of International's failure to raise the constitutional issues below which it now seeks to raise here.

In Webb v. Webb, 451 U.S. 493, 68 LEd 2d 392, 396, 101 SCt 1889 (1981), one of this Court's latest pronouncements on the issue which, ironically, arises from a decision by the Georgia Supreme Court, you held:

> "Because this case comes to this Court from a state court, the relevant jurisdictional statute is 28 USC §1257 [28 USC §1257]. As applied to the circumstances of this case, that statute requires that in state courts petitioner have 'specially set up or claimed under the Constitution . . .of. . .the United States' that right which [it] now seeks to have this Court enforce. 28 USC §1257 (3) [28 USCS §1257(3)]. Similarly our Rule 21.1(h) requires the petitioner to 'specify the stage in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the Court.'"

Compliance by the Petitioner here with these necessary prerequisites is utterly lacking.

As the Court will note in its petition, International failed to comply with this Court's Rule 21.1(h) both in specification as to the stage in the proceedings below wherein the question was raised, and in inclusion in its Appendix of such portion of the record which will reflect compliance

with this rule. The obvious reason for this failure is that International neither at the trial level, nor at the appellate level in the Georgia Court of Appeals, nor at the appellate level in the Georgia Supreme Court raised the issues which it now seeks to raise. Consequently, neither the trial court, nor the Georgia Court of Appeals, nor the Georgia Supreme Court passed upon any of these issues.

Petitioner's claim of exemption from the requirements of 28 USC 1257(3) is based on a distortion of the facts.

International seeks to escape the consequence of this fatal defect first by showing that "Petitioner's constitutional attack was raised in the motions for rehearing filed with the Georgia Supreme Court." It relys upon this Court's ruling the Cox Broadcasting Corp. v. Cohn, 420 US 469, 43 LEd 2d 328, 95 SCt 1029 that an issue is

properly preserved where it is raised for the first time on motion for rehearing and the Court rules thereon.

Petitioner's motion for rehearing in the Georgia Supreme Court in Enfinger is attached to this response as Addendum E, its motion in Odom being substantially identical. Plainly the equal protection claim specified as A(1) of its questions presented for review is the only constitutional issue mentioned in those motions. As further shown by the copy of the orders attached hereto as Addenda F and G denying the motions for rehearing in both cases, the Georgia Supreme Court made no ruling on this issue. Accordingly, Cox Broadcasting, supra, has no application here and offers International no exemption.

The remaining issues specified by International in its petition as questions (A)2, 3, 4, and 5 were raised by it for the first time in its petition for

certiorari. Accordingly, the carrier's only hope of obtaining a hearing on any of these claims is that it might somehow show that it was surprised by the decision sought to be reviewed, under the logic of Missouri v. Gehner, 281 US 313, 74 LEd 870, 50 SCt 326 (1930) and Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 US 673, 74 LEd 1107, 50 SCt 451 (1930). It therefore tells this Court that:

> ". . .The ruling of the Georgia Supreme Court in the above referenced cases could not have been anticipated due to the body of law construing subsection (c) of O.C.G.A. §33-34-5, upon which the petitioner had relied, and which decisions the Georgia Supreme Court earlier had the opportunity to review and reverse but chose not to do so.", [Petition, p. 11] (Emphasis supplied)

The "body of law construing subsection (c)" to which Petitioner refers are those cases cited in its statement of the case [Petition, p. 8] as the grounds for its refusal to pay Respondents' claims in the

first place, to-wit: Jones v. State Farm Mut. Auto. Ins. Co., 156 Ga. App. 230 (274 SE2d 623) (1980), State Farm Mut. Auto. Ins. Co. v. Bates, 542 F.Supp. 807 (1982), Shave v. Allstate Ins. Co., 549 F.Supp. 1006 (1982), and Nalley v. Select Ins. Co., 165 Ga. App. 345 (1983).

But each of the cited cases had either been reversed, limited, or otherwise undermined well before Enfinger and Odom even went up to the Supreme Court of Georgia. First, Jones, supra, was overruled by the Georgia Court of Appeals in Flewellen v. Atlanta Cas. Co., 164 Ga. App. 865, (300 SE2d 166) (1982). When the Supreme Court of Georgia reversed Flewellen, supra, at 250 Ga. 709 (300 SE2d 673) (1983) it also exploded the "continuing offer" theory of Jones on which Bates, supra, and Shave, supra, had depended and replaced it with the concept that every no-fault policy carried the full quantum of optional benefits from

its inception as dictated by O.C.G.A. 33-34-5(a) unless the latter were properly rejected in writing in the manner prescribed by O.C.G.A. 33-34-5(b). While a footnote to a special concurrence in Nalley, supra, at 251 Ga. 723, concedes that "one possible construction of O.C.G.A. §33-34-5" is the one Petitioner favors, the later case of Stafford v. Allstate Ins. Co., 252 Ga. 38 (___SE2d ___) (1984) stated outright that "O.C.G.A. §33-34-5(c) applies to policies in existence on March 1, 1975. O.C.G.A. §33-34-5(b) applies to applications for policies beginning on March 1, 1975. Each category of policies is governed by the respective requirements of the statute." 252 Ga. at 40. (Parallel citations omitted). See also Waird v. Phoenix Ins. Co., 251 Ga. 698 (___SE2d___) (1983), outlining the legislative history of O.C.G.A. 33-34-5(c), and strongly intimating the restricted application of subsection (c) to pre-March

1, 1975 policies.

The decision of the Supreme Court of Georgia in the case at bar was amply foreshadowed by its prior rulings. International's claimed surprise, if taken as true, could only have resulted from a refusal to read the precedents cited by its opponents.

The suspect nature of Petitioner's claimed reliance on the "body of law construing subsection (c)" is highlighted by the fact that at page 8 of its petition it seems to be saying that it relied upon the same "body of law" in sending out its written offers of optional coverages to the Respondents herein. But the letter to Respondent Odom [Addendum C] was dated and allegedly mailed on January 18, 1978, some two years and nine months before Jones, the first of the cited decisions, was even issued. The letter to Mr. Enfinger [Addendum D] was dated September 22, 1980, still one month before Jones. Even then,

Bates v. State Farm, the next in the cited line of cases was still almost two years away.

In short, Petitioner's attempt to claim refuge in the unanticipated decision exception of Gehner, supra and Brinkerhoff-Faris, supra, is at best disingenuous, and should be rejected.

Finally, Respondents note that at no point in its petition does International offer any explanation for its failure to raise its constitutional challenges when it first appealed the matter from the trial level to the Georgia Court of Appeals. In each instance, the trial court's ruling was the same as that of the Georgia Supreme Court ruling here complained of, and the constitutional ramifications, if any, identical.

As was stated by this Court in Webb, supra:

"There are also very practical

> reasons for insisting that federal issues be presented first in the state-court system. The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness or overbreadth. This rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner. Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our own workload, this is a very substantial matter."

International having failed to properly raise the constitutional issues which it now wishes for this Court to

decide, under this Court's earlier decision in Webb, supra, it is without jurisdiction in the matter and cannot issue any writ of certiorari to the Georgia Supreme Court.

B. INTERNATIONAL FAILED TO COMPLY WITH THIS COURT'S RULES 21.1(j) AND 17 IN THAT IT HAS FAILED TO SHOW ANY SPECIAL OR IMPORTANT REASONS FOR THIS COURT TO REVIEW THIS MATTER ON WRIT OF CERTIORARI.

As to the lone constitutional issue mentioned by International in its motion for rehearing before the Georgia Supreme Court, (issue (A)1, petition pp. 1-2) it has failed to comply with this Court's Rule 21.1(j), as well as this Court's Rule 17. The only applicable portion of Rule 17 on considerations governing review of certiorari would be under 17.1(c) where a state court has decided an important question of federal law which should be settled by this Court or has decided a federal question in a way in conflict with applicable decisions of this Court. Here, International has not shown in any fashion how either what important question of federal law needs to be settled, or any decision of this Court

with which the judgment complained of conflicts. Indeed, nowhere in its argument (Petition, pp. 11-14) does it address this issue in any fashion. Accordingly, there is nothing to which Respondents can respond.

CONCLUSION

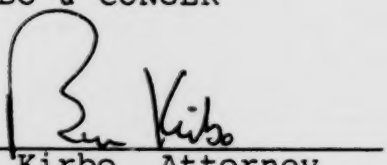
Petitioner International Indemnity Company has failed to specify, as required by this Court's rules, either how and when the issues which it seeks to have reviewed were raised and decided in the courts below or wherein this case is of sufficient importance to entitle it to review by certiorari. Ultimately, however, its petition must be denied precisely because the Court lacks jurisdiction to decide issues which were not first raised and decided below and no exception to this principle has been made out.

Accordingly, Respondents respectfully

request, and strenously urge this Court to deny International's petition for writ of certiorari and let the State court judgments be enforced immediately.

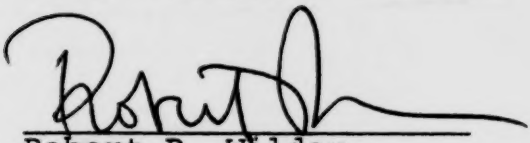
Respectfully submitted this 22nd day of October, 1984.

KIRBO & CONGER

By: 

Ben Kirbo, Attorney
for Respondent
Enfinger

TATE, MALLERNEE & WILDAU

By: 

Robert P. Wildau,
Attorney for Respondent
Odom

APPENDIX MATERIALS,

ADDENDA A THROUGH G,

HAVE BEEN LODGED

WITH THE CLERK.

CERTIFICATE OF SERVICE

GEORGIA, DECATUR COUNTY.

We do hereby certify that we have this day served a copy of the within and foregoing Response together with Addendum attached thereto upon International Indemnity Company, Petitioner, by depositing two copies of the same in the United States Mail in an envelope properly addressed with sufficient postage affixed thereto to assure the transmittal thereof to its attorney of record, to-wit:

Mr. Michael L. Wetzel
GURLEY & FOWLER, P.C.
P. O. Drawer 29825
Atlanta, Georgia 30359.

This 22d day of October, 1984.

KIRBO & CONGER

By: _____
Ben Kirbo, Attorney for
Respondent Enfinger

TATE, MALLERNEE & WILDAU

By: _____
Robert P. Wildau, Attorney
for Respondent Odom